



# Anti-corruption enforcement around the world

Recent corruption investigations in China involving employees of multinational corporations continue what has been a busy year for Chinese and foreign regulators investigating corrupt practices both at home and abroad. It is therefore timely to survey briefly this year's developments in anti-corruption laws and investigations in the People's Republic of China, the UK, the US and Germany. Developments in the UK, US and Germany are relevant to companies conducting business in China because these countries have long-arm jurisdiction to investigate and prosecute corrupt practices overseas. In addition, parent companies in the UK, the US and Germany may be implicated in corruption procedures through the actions of subsidiaries and employees in China.

## Introduction

This briefing will review, in greater depth, the following multi-jurisdictional observations:

- in China, new bribery offences have been introduced to cover 'influence-peddling' by the relatives and associates of public officials and a new whistle-blower regime has been established to encourage corruption tip-offs by the public and to improve information sharing between government agencies;
- in the UK, new anti-bribery legislation has been proposed and a new corruption self-reporting regime has been introduced;
- in the US, prosecutors have targeted a record number of non-US companies; and
- in Germany, a new US-style approach to resolving corruption cases may be emerging.

### CHINA

#### Anti-corruption laws to cover relatives of public officials

In February 2009, amendments to the People's Republic of China (PRC) Criminal Law were passed and introduced several new criminal charges relating to bribery to supplement the current provisions. Most notably, the amendments include a new criminal charge of 'bribery by influence', which extends the current scope of corruption and bribery liabilities by public officials to their relatives and 'closely related persons'.

Any close relative or other person who has a close relationship with a public official and who seeks to profit

from providing, or seeking to provide, an improper benefit to a third party as a result of the public official acting in his or her official capacity or by taking advantage of the public official's authority or position will be guilty of the crime of bribery. The liability for 'bribery by influence' extends to the close relatives or other closely related persons of a public official who has left his or her position.

#### Whistle-blower's corruption hotline

In April 2009, the Supreme People's Procuratorate (SPP) issued amended whistle-blowing provisions that aim to encourage whistle-blowing and to improve the way in which whistle-blower complaints are handled, especially when those complaints concern suspected corruption by state officials. The whistle-blowing provisions provide for the centralised storage of information obtained from whistle-blowers and for that information to be shared with other government agencies.

In June, as part of this new whistle-blowing regime, the SPP launched a nationwide whistle-blower hotline number and website.

### UK

#### New bribery legislation

In March 2009, the Ministry of Justice produced a draft Bribery Bill, which proposes sweeping changes to the UK's law on bribery. If implemented in its current form, the Bribery Bill will remove the UK's existing bribery offences and replace them with four offences: offering a

bribe, receiving a bribe, bribing a foreign public official and a new corporate offence of failing to prevent bribery (the corporate offence). Key features of the Bribery Bill, particularly as regards the corporate offence, are as follows.

- A company would commit the corporate offence if a person (the briber) performing services for, or on behalf of, a company committed the offence of offering a bribe or bribing a foreign public official in connection with the company's business and a 'responsible person' was negligent in failing to prevent the bribe.
- A 'responsible person' would be someone whose functions included preventing the briber from committing the offences of offering a bribe or bribing a foreign public official. If there were no such person, a responsible person would be a director, manager, secretary or other similar officer (a 'senior officer'). The corporate offence could also be committed if a number of responsible people 'taken together' were negligent.
- It would be a defence for a company to prove that it had in place 'adequate procedures' designed to prevent those who perform services for or on behalf of the company from offering a bribe or bribing a foreign public official. However, the defence would not be available if the negligence were wholly or partly that of a senior officer or a person purporting to act in that capacity.

The corporate offence would apply to companies and partnerships formed in England and Wales or Northern Ireland, as well as to companies and partnerships formed overseas that carry on business in England, Wales or Northern Ireland.

## Corruption self-reporting regime

Since his appointment as director of the Serious Fraud Office (SFO) in mid-2008, Richard Alderman has promised to overhaul and reinvigorate his organisation, which has had little success in prosecuting offences involving corruption abroad. To this end, the SFO announced in July a new self-reporting regime more in line with the system of self-reporting implemented by the US regulators, the Securities and Exchange Commission (SEC) and the Department of Justice (DOJ). Corporates (both UK companies and overseas subsidiaries) are

encouraged to approach the SFO and self-report any suspected corruption.

The risk for companies is that a failure to self-report will be seen as a sign of not being prepared to adopt a compliance culture on corruption; a conclusion that is likely to be reflected in the type and size of sanctions sought, whether criminal or civil. The risk and scale of these sanctions will, of course, be strengthened considerably if the new Bribery Bill becomes law, because it would be much easier to make companies criminally liable. We discuss this further below.

US

## Prosecutors target record number of non-US companies

Research conducted by our US litigation practice indicated that in June 2009 at least 93 companies worldwide were being investigated by the DOJ and SEC under the Foreign Corrupt Practices Act (FCPA), the US law designed to crack down on the bribery of foreign officials and improve transparency of corporate accounting. Of these, 31 per cent (29 cases) involved non-US corporate entities, seven of which were UK companies. This phenomenon is part of a growing trend in which US authorities are targeting non-US corporations in a continuing effort to expand what they assert is their jurisdiction over persons and business activities outside the US. In the past year, Freshfields has advised German and French companies, among others, on investigations by the DOJ and the SEC.

A number of FCPA enforcement actions have been finalised since then, including a number of cases against individuals. These include the following.

- The former sales director of a US technology company has paid a \$30,000 civil penalty and \$26,707 in disgorgement and interest to the SEC to settle charges that were laid against him for violations of the FCPA. The SEC alleged that the sales director authorised the payment of bribes to employees of Chinese state-owned enterprises (SOEs) in order to obtain sales contracts for the company and directed that accounting entries be modified to hide those payments.
- The chief executive officer (CEO) and former chief financial officer (CFO) of a US consumer products

company each agreed to pay \$25,000 in civil penalties to settle civil complaints brought against them and the company by the SEC. The SEC alleged that the company's subsidiary in Brazil had paid bribes to customs officials to import products into Brazil and had purchased false documents to cover up those payments. The SEC used provisions in the Exchange Act to connect the CEO and CFO to the FCPA violations, as the CEO and CFO were in 'control' of the individual employees paying the bribes.

#### GERMANY

### A new US-style approach to resolving corruption cases?

German regulators have, in the past year, completed a large-scale investigation for alleged corruption offences committed outside Germany, resulting in a multi-million settlement payment made by a German multinational in Germany and the US. This signals a new approach to the investigation and prosecution of foreign corruption. We note:

- there is a high level of co-operation between the investigating authorities in Germany and the US;
- the co-ordinated timing of the US and German settlements; and
- the full co-operation offered to the enforcement authorities and strong commitments made by the German company to implement strict compliance procedures were recognised and taken into account by the enforcement as mitigating elements.

Several multinational companies were and are the focus of media attention because of cases of foreign corruption. These cases have led numerous criminal bodies to start proceedings against companies and individuals involved in this misconduct. It is generally expected that German authorities will expand their efforts to enforce German laws on foreign corruption in the future.

This investigation has brought to the attention of German companies the risks enterprises are facing under German laws in connection with foreign corrupt practices and triggered a boom in establishing and strengthening compliance mechanisms, particularly anti-corruption controls.

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